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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 404

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION NO. 310, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*
and
SHAMROCK DAIRY, INC., *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR THE RESPONDENT SHAMROCK DAIRY, INC., IN OPPOSITION

GERARD D. REILLY
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington 5, D. C.

RICHARD G. KLEINDIENST
1018 Title & Trust Building
Phoenix, Arizona

Of Counsel:

REILLY and WELLS
1120 Tower Building
Washington 5, D. C.

SHIMMEL, HILL & KLEINDIENST
1018 Title & Trust Building
Phoenix, Arizona

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STATEMENT

In its brief in opposition, the Board has summarized the findings, conclusion and order of the Board and the basic question presented herein. While this summary is correct, it omits some pertinent facts which show that Petitioner's statement of the case is inaccurate in certain important respects.

At a series of meetings commencing July 12, 1955, the Intervenor (referred to herein as the Company) informed its drivers that it had under consideration a plan whereby it would sell its trucks and routes to persons who would operate them on an individual distributorship basis (J.A. 112, 148, 62). Details of the plan were explained, and the drivers were invited to take advantage of an opportunity to make greater earnings as independent businessmen (J.A. 62). Upon learning of this, the Union business agent called a meeting of the Company drivers on July 17, and advised them to take the proposed independent contractor agreements to their own attorneys and statisticians and decide for themselves whether to accept (J.A. 5).

Such action is hardly consistent with the Union's statement to this Court (Pet. p. 6) that the employees were coerced by "threat of discharge on the one hand and promise of benefit on the other". Indeed, on July 20 the Company expressly notified those of its drivers who were reluctant to enter into the proposed agreements that such action was optional, and that if they did not wish to sign, they would continue their employment under the provisions of the existing union contract (J.A. 108). Moreover, on the previous evening the Union business agent had again urged that the drivers consult with their attorneys concerning the desirability of the proposals.

Contrary to Petitioner's assertion (Pet. p. 6) that the Union, upon learning of the proposals, immediately protested, it was not until July 29, 1955 that the Union notified the Company that its signing of individual contracts with the drivers constituted a breach of the collective agreement (J.A. 113, 148-9). During the interval between the Company's proposal and the

Union's protest, the business agent had spoken to Company representatives without raising any such issue. Only after some 20 drivers had accepted the Company's offer did the Union raise any objection.

All but six of the Company's drivers accepted the Company's offer (J.A. 113, 118). Those six were permitted to work under the terms of the collective bargaining agreement until its expiration on October 1, 1953. It was not until October 3, that their employment was terminated (J.A. 113-114, 150).

The adoption of the distributorship contracts brought about substantial changes in the relationship between the Company and its former employees.

The manner of servicing the routes was considerably transformed. During the period in which the truck drivers were employees, the Company supervisors had laid-out routes and changed routes and territories (J.A. 66; 120, 151), recommended promotions and dismissals (J.A. 66), required a certain number of calls per day as well as solicitation of new routes (J.A. 9, 120, 151), and determined the order of stops along the route (J.A. 33). Under the individual distributorships, the contractor was controlled in none of these matters. He fixed his own hours of work, including starting time and finishing time, determined the order in which he would service his route, and solicited new business only if and when he so chose (J.A. 32, 120, 151). Distributors solicited new business by such devices as the distribution of calendars, recipes and pens (J.A. 33, 52-55, 110).

Before the changeover, the Company paid the expenses of maintaining and insuring the trucks. It did not permit its drivers to carry riders, and insisted

that the trucks be returned to Company premises at the end of the day (J.A. 10, 18). The distributors maintained their own trucks and paid insurance (J.A. 16-18, 120, 152). Some put their own names on the trucks and used them for their personal convenience, housing them in their private garages (J.A. 10, 18, 24-5). They purchased their own advertising media and used the trucks to sell products that the Company did not handle, such as ice cream, oleomargarine, hams and turkeys (J.A. 48, 55, 59, 120, 152).

Before the establishment of the distributorships employees were guaranteed a certain salary and were also paid commissions on sales. Thereafter, they purchased their own commodities at one price, sold them at a higher price, deducted the expenses of the operation, paid themselves a salary and counted the balance as their profit margin. In short, their compensation was based upon the differential between the cost to them of their product and the sales price at which they sold it. Of significance is the fact that some distributors sold their products at prices other than the standard industry price (J.A. 49, 56, 57, 120).

The collection of accounts was altered by the new method of distribution. Previously customers paid their bills to the Company and the Company determined whether or not to extend credit (J.A. 20, 35). Subsequently, the distributors received payment directly, made determinations with respect to the extension of credit, and in one case, even sued a delinquent customer (J.A. 20, 35, 54).

Distributors employed bookkeepers and kept profit and loss accountings, as well as maintenance of business, bank and checking accounts. They paid their own sales taxes, procured their own peddler's licenses,

and carried their own liability insurance (J.A. 12, 13, 46, 152). Once the Company adopted the distributorship system, it no longer carried the distributors on its payroll records. It made no income tax or social security tax withholdings in their behalf. Nor did it carry workmen's compensation with respect to the distributors.

Moreover, before the establishment of distributorships the Company gave drivers vacation pay and provided relief drivers in the event of the regular driver's absence. Afterwards, the distributor was responsible for his relief, and hired whatever help he needed, paying such helpers or substitutes out of his own income (J.A. 21, 23, 31-32, 151).

ARGUMENT

The record presents no issue encompassed by the rules for granting a writ of certiorari. Petitioner's basic quarrel with the affirmance of the Board order by the court below is that such order was narrower than the relief to which it was entitled. In order to reach that question, however, Petitioner would have to demonstrate to this Court that both the Court of Appeals and the Board erred in finding that certain challenged individual contracts established a genuine independent contractor status. Even though this Court should agree with Petitioner on this substantive question, it would not follow that Petitioner was improperly denied the relief for which it is contending. This Court has repeatedly stressed that the formulation of a remedial order under Section 10(c) of the Act "is particularly a matter for administrative competence" and that "courts must not enter the allowable area of the Board's discretion". As Petitioner

does not argue that the Board exceeded its statutory powers in this case, further judicial review of the substantive issue would be unavailing so far as Petitioner is concerned with respect to accomplishing a revision of the Board order.

Accordingly, there is no basis for Petitioner's assumption that if it be held that the Board (and the court below) should have found violations of Sections 8(d) and 8(a)(3) of the Act—the Board would thereupon be *compelled* to order that the individual distributorship contracts freely executed by the former employees be abrogated, and that the six drivers who did not wish to enter into the distributor contracts be reinstated as employees with back pay.

1. The Union's Formulation of the "Questions Presented" Describes an Issue Not Presented by the Record

In its petition for certiorari, the Union has stated that the case presents two questions for the consideration of this Court. The first question deals with the adequacy of the remedy and the second with whether a proper conclusion of law was drawn from the findings of fact. The first question as drawn in the petition (Pet., p. 2), however, assumes a hypothetical situation, it complains of the inadequacy of a Board order in a case "... where the employer had not given the notices of termination or modification of the collective agreement and had not continued it in full force and effect for its term as required by Section 8(d) of the Act ...".

This case could be described in the foregoing manner only if this Court should hold that the second question presented in the petition should be answered in the affirmative. This would necessitate a holding that the Court of Appeals erred in its conclusion that "the

drivers ceased to be employees and became independent contractors when they signed contracts for distributorships". The Union itself regards this latter issue as one of law (Pet., p. 19).

Unless the drivers remained employees after the execution of the individual contracts, the employer was not attempting to terminate or modify any collective agreement relating to wages, hours and conditions of *employment*. No party has contended that with respect to the employees covered by the collective agreement who did not enter into the individual distributor arrangement, the agreement regarding them was not "continued in full force and effect for its term". This includes the six drivers who refused to sign. Their employment continued until after the expiration of the collective agreement, when it was terminated as a result of what the court below described as a "reduction in force" (Pet., p. 23). Thus the first question raised by the Union in its petition would never be reached unless this Court decides to reverse the court below on the issue of employee status which Petitioner obviously regards as one of secondary importance.

Somewhat inconsistently in the body of its petition, however, the Union contends that even though the employment status question was properly resolved against it (Pet., p. 14), the Board still should have enlarged its remedial order so as to have granted Petitioner the relief it sought, viz., abrogation of the independent contractor contracts and reinstatement of the six drivers who had declined to sign them.

Obviously this is a broader issue[1] than the one

[1] The Board in restating the "question" for its Brief in Opposition assumed that this was the issue upon which the Union wanted this Court to pass. It overlooked the hypothetical background in which the Union posed the issue of remedy.

described by Petitioner itself in the "questions presented" and is certainly one not presented to this Court in view of the limitations imposed by Petitioner in formulating it.

2. The Court of Appeals Was Plainly Correct in Holding That the Drivers Who Signed Individual Contracts Were No Longer Employees

In urging this Court to resolve the status as "employees" under Section 2(3) of the Act of persons entering into individual distributorship contracts with the Company, Petitioner professes to discover an issue of "national importance". It is difficult to understand how the resolution of the question in the instant case could have any bearing on the future administration of the Act. So far as the Act is concerned, the test for distinguishing between "employees" and "independent contractors" is clear. In the case of *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, this Court held that the term "employee" might well have a broader meaning in the context of Federal social legislation than the ordinary common law standard.

On this sole ground, it reversed a holding of the Court of Appeals for the Ninth Circuit which had set aside a Board order predicated upon an administrative finding that certain news vendors were "employees" of the newspapers they distributed. According to the reviewing court, the finding could not be supported on ordinary principles of the law of agency—a view not overruled by the Supreme Court.

The legislative history of the Taft-Hartley Act makes it clear that the addition of the words "independent contractor" in the text of Section 2(3) was intended to overrule the *Hearst* decision and to make

the common law test, rather than the broad policy of the Labor Relations Act, controlling with respect to determining whether a given person was an employee.[2]

It is submitted that the opinion of the dissenting judge in the court below to the contrary flies in the face of manifest Congressional intent. The text of the opinion also fails to mention that the enlargement of the scope of judicial review in Sections 10(e) and 10(f) was explained by the Senate Committee in its report as necessitated by "the great tendency on the part of the courts not to disturb Board findings even though they may be based on questions of mixed law and fact. *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111 . . .".[3]

If this principle of law were in dispute, an issue of importance would presumably be raised. But the court below did not depart in the least from common law precepts, merely applying the recognized law to the facts (as stated in the Board's brief in opposition) in approving Chairman Leedom's finding concerning the independence of the owner-drivers from Company

[2] "The House bill excluded from the definition of employee individuals having the status of independent contractors. Although independent contractors can in no sense be considered to be employees, the Supreme Court in *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, held that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the labor act. Consequently it refused to consider the question of whether certain categories of persons whom the Board had deemed to be employees were not in fact and law independent contractors". *Report of Hse. Conf. Mgrs.*, No. 510 on *H.R. 3020*, 80th Cong., 1st Sess., pp. 32, 33; *Legis. Hist.*, pp. 536-37.

[3] *S. Rept. No. 105 on S. 1126*, 80th Cong., 1st Sess., *I Legis. Hist.*, p. 432.

control. This finding did not seize upon a single element as controlling its decision. Instead, it weighed all the factors governing the relation between the Company and the drivers. Hence consideration by this Court of such issue in the instant case would result only in a decision limited to the particular provisions of the challenged contract and would provide little guidance for the Board or the courts in future litigation involving slightly different factual situations.

In any event, the conclusion of the court below on this point was not erroneous, despite the absence of any statement explaining its basis. The summary of the purported facts upon which two Board members rested their disagreement with Chairman Leedom and on which the dissenting judge relied, is not only inaccurate in some particulars[4] but ignores the actual administrative practice under the individual contract. Thus the minority opinion failed to mention that many of the drivers purchase their own advertising media and have their names painted on the trucks, that several of the owner-operators also carry and sell products not processed by the Company, such as ice cream, oleomargarine, eggs, bacon, ham and turkeys, that they are free to charge whatever prices they see fit to customers on their routes, and that their earnings depend upon the difference between the price they pay the Company for their milk and the price

[4] E.g., It is a distortion to characterize a right to re-purchase on 30 days notice as a "right to terminate unilaterally the services of a driver for any cause". Nor is the duty of the driver to hire his own relief and vacation help, as found by the trial examiner, the same as "the right unilaterally to name and appoint substitutes for the driver". The record is also barren of any evidence to support the assertion that the Company reserved "the right to police the manner in which those services are rendered."

they charge, less such expenses as the owner-operator incurs for advertising, helpers' wages, truck maintenance, licensing, insurance and other costs of operating the business.

Neither of these Board members, nor the dissenting judge, showed any awareness of a decision of this Court affirming a decision that in situations similar to the instant one, the actual administrative practice of a supply company with respect to owner-drivers rather than the theoretical control retained by the Company should be deemed controlling. *Gray Line* v. *Harrison*, 156 F. 2d 412 (CA 7), aff'd *sub nom. United States* v. *Silk*, 331 U.S. 704.

That holding of this Court is of particular significance here as the question of the employee status of the owner-truck drivers involved in the *Gray* case arose under the Social Security Act and the Court in deciding that the owner-operators were not employees, also considered the possibility that the word "employee" might have a broader meaning in the context of Federal social legislation than the ordinary common law standard. As Congress disapproved the *Hearst* holding when it amended Section 2(3) of the Act so as to exclude from the definition of "employee" individuals having the status of independent contractors, the result reached by the Court in *Gray* would seem to control here *a fortiorari* where the term "employee" because of the Taft-Hartley amendment has a narrower meaning. Obviously the drivers of the *Gray* case had considerably less latitude for the exercise of independent discretion than the owner-drivers whose status is at issue here.

3. The Contention That the Board Would Have Been Compelled to Issue a More Stringent Order If It Found the Drivers Retained Their Status as Employees Is Plainly Without Merit

The heart of the Union's disagreement with the Board and the Court below lies in its contention that the remedy, rather than requiring the Company to bargain with the Union in the future with respect to the installation of individual distributorships, should abrogate the existing contracts and reinstate to employment the six former employees who refused to accept the employer's proposal. According to Petitioner (Pet., p. 14) had "a majority of the Board been able to conclude that the drivers had retained their employee status notwithstanding the signing of the individual agreements, the Board would have been obliged to grant the additional relief requested." Petitioner cites no authority for this proposition other than to assert that "it is not controverted by counsel for the Board and it is implicit in the Board's decision . . .". The record, however, reveals no such concession, implied or express.

Acceptance of the Union's proposition would jeopardize the long established discretion of the Board to formulate remedies on the basis of its experienced judgment.

On several occasions this Court has not only acknowledged but emphasized the importance of such discretion to the administration of the Act. Thus in *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, this Court expressed the broad reaches of Board authority in the area of remedy and the consequent limited scope of judicial review in the following terms, 313 U.S. at 194:

> "A Statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaption of means to end to the empiric process of administrations. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers."

This decision was noted with approval in *N.L.R.B.* v. *Gullet Gin Co.*, 340 U.S. 361. See *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (accord).

That the administrative discretion reposed in the Board was not abused is clearly indicated by an analysis of the record and the Board's findings with respect to that record. The Board found, and indeed there was no evidence to the contrary, that the Company's changeover from employee drivers to independent drivers was not motivated by the desire to avoid bargaining with the Union but was undertaken solely

for economic reasons, the Board stating, 119 NLRB at 1007:

> "The record in the instant case does not establish that, in discharging the six drivers or in instituting the independent distributorship system, the Respondent was motivated by any desire not to bargain with, or to discourage membership in the Union. Here, as in *Brown Truck*, as far as appears, the Respondent engaged in such conduct because of economic considerations."

Again, in its Decision and Order on remand, 124 NLRB No. 63 at 4, the majority states:

> "The Chairman further finds that the Respondent adopted the new distributorship system for economic reasons and that, in discharging the six drivers who refused to sign independent distributorship contracts, the Respondent was motivated by economic considerations and thus did not violate Section 8(a)(3) of the Act."

In view of this finding, it is clear that the evidence cannot sustain a finding of an 8(a)(3) violation based upon a purported desire to thwart union organization or representation through the discharge of the six recalcitrant employees. Nor does the Union seriously contend that the latter reason governed their discharge (Pet., p. 17). The most that can be said for the Union's position was the stated rationale of the dissenters to the Board decision who would order the reinstatement of the dischargees as a derivative of the 8(a)(5) violation on the theory that "the six drivers lost their jobs as a direct consequence of the Respondent's failure to confer with the Union . . ." If the theory of the dissenters is true, that reinstatement and back pay can be predicated upon a finding of 8(a)(5), the violation found herein, subsidiary findings of an

8(d) or for that matter an 8(a)(3) violation would be superfluous to the fashioning of a remedy, since neither finding would be inconsistent with the Company's unquestioned good faith in the matter.

The Union has asked that "the redress to be affected should include not only abrogation of the individual contracts, but also reinstatement of the six discharged drivers". (Pet., p. 17). The real question posed is this: in denying such relief, did the Board abuse its discretion in ordering cessation of future refusals to bargain without nullifying past acts in a situation where the Company in good faith has substantially transformed its method of operation with the apparent approval of its former employees, though without requisite discussion with the Union. The answer clearly is in the negative.

Of significance to the framing of the Board's order is the fact that at the initial hearing 46 of the independent truckdrivers "sought to intervene to protect their interests under the individual contracts", 119 NLRB at 998, n. 2. Their desire to intervene demonstrates that the drivers regarded their independent status as an economic improvement rather than a deprivation of rights. For the Board to nullify economic benefits admittedly satisfactory to the bulk of the drivers merely because the Company had unwittingly committed a technical violation of the Act would surely do violence to the avowed statutory policy "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . ." Labor-Management Relations Act, Section 1(b).

Thus the Board's order is not unreasonable, and in fact constitutes a delicate balancing of interests among the rights of employees, union, and employer.

It therefore falls well within the allowable discretion referred to in *Phelps Dodge* and subsequent cases, and, in accordance with the decisions of this Court, is not subject to judicial revision.

The notion that the doctrine of *N.L.R.B.* v. *District 50*, 355 U.S. 453, has some application to the instant case must be rejected. There, the Court, far from modifying a Board order because it was too narrow, held that the Board had acted in excess of its authority by framing an order which was intended to do more than remedy a particular unfair labor practice situation. The case contained no suggestion, however, that regardless of extenuating circumstances, a finding of a specific unfair labor practice made it incumbent upon the Board to prescribe the most extreme remedy within its powers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

GERARD D. REILLY
LAWRENCE T. ZIMMERMAN
1120 Tower Building
Washington 5, D. C.

RICHARD G. KLEINDIENST
1018 Title & Trust Building
Phoenix, Arizona

Of Counsel:

REILLY and WELLS
1120 Tower Building
Washington 5, D. C.

SHIMMEL, HILL & KLEINDIENST
1018 Title & Trust Building
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